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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

SAMUEL EVANS MASSENGILL, Petitioner

vs.

J. T. WILSON, Administrator of the Estate of Pearl Locklair, Deceased, Respondent

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PETITION

Petitioner prays this Court to review on writ of certiorari the judgment of the United States Circuit Court of Appeals for the Sixth Circuit in the case there styled J. T. Wilson, Admr., of the estate of Pearl Locklair, deceased, appellant, vs. Samuel Evans Massengill, doing business as the S. E. Massengill Company, appellee, No. 8751, rendered on the 9th day of January, 1942 (R. 14), and based upon a written opinion by that Court rendered on the same date

(R. 16), which judgment reversed a judgment of the United States District Court for the Northeastern Division of the Eastern District of Tennessee (R. 10), which dismissed the suit of respondent, original plaintiff below. The District Court holding that respondent's suit was barred by the Statute of Limitations.

SUMMARY STATEMENT OF MATTER INVOLVED

Respondent, a resident of the County of Charlotte, State of South Carolina, on April 11th, 1938, qualified in that County as administrator of the estate of Pearl Locklair who died intestate on the 4th day of October, 1937. He also qualified as ancillary administrator of her estate in the County of Sullivan, State of Tennessee, on February 29, 1940.

On March 8th, 1940, respondent, as such administrator, instituted an action at law against the petitioner in the United States Court for the Northeastern Division of the Eastern District of Tennessee, to recover damages for alleged wrongful and negligent acts causing the death of his intestate. The negligent and wrongful acts alleged being the manufacture and distribution by petitioner of a preparation known as "Elixir Sulfanilamide" which, when taken by his intestate, caused her death.

This suit was instituted on March 8th, 1940, two years, five months and four days after the death of respondent's intestate on October 4th, 1937, and one year, ten months and twenty-seven days after respondent first qualified as administrator in South Carolina. The suit was grounded upon Sections 411, 412, 413, and 414, Title 5, Chapter 15, of the Code of Laws of South Carolina for 1932. (R. 5 & 6).

Petitioner entered plea denying negligence as alleged, and averring that if respondent had any cause of action the time within which his suit must be instituted is governed by the laws of Tennessee, the forum State, and that such cause of action, under the Statute of Limitations of the State of Tennessee, must be instituted within twelve months of the date the cause of action arose. (R. 8). In respondent's motion to strike the plea of the Statute of Limitations (R. 9) it was alleged that the period of limitation for instituting action for wrongful death under the laws of South Carolina was six years, "that Tennessee is bound to recognize the six year Statute of Limitations of South Carolina under the full faith and credit clause, Article 4, Section I of the Constitution of the United States. (R. 9)."

On the hearing of this motion, the District Judge entered memorandum opinion, (R. 9 & 10) holding that the Tennessee Statute of Limitations of twelve months controlled; that respondent's action instituted outside of the twelve months period but within the six year period was barred and respondent's suit was dismissed. Judgment was entered accordingly. (R. 10).

Upon appeal by respondent to the Circuit Court of Appeals for the Sixth Circuit that Court, on January 9th, 1942, rendered an opinion (R. 16) holding that the South Carolina Statute of six years was applicable, that respondent's suit was timely instituted, reversed the District Court and remanded the case for trial upon its merits. (R. 14). In holding that the limitation of South Carolina was controlling rather than the limitation of the forum State, the Sixth Circuit based its opinion upon the principle,

> "that where, by statute, a state creates a cause of action for death by wrongful act and prescribes in

> the same statute a limitation period for action, such limitation will be applied in the forum of a sister state, even though the period of limitation for like actions in the latter state is shorter." (R. 22).

It was also found that the Tennessee Courts had announced no opinion to the contrary.

Judgment was accordingly entered reversing and remanding the case. (R. 14).

JURISDICTION

The judgment sought to be reviewed was entered January 9th, 1942.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13th, 1925, 43 Stat. 938, 28 U.S.C. 347(a).

QUESTIONS PRESENTED

1—Where civil suit was instituted in Tennessee for damages for alleged wrongful acts causing death on cause of action arising in the State of South Carolina, does the Statute of Limitations of six years in South Carolina control the time of suit, or does the Tennessee Statute of Limitations of one year for such actions, control?

2—Is the Statute of Limitations of South Carolina, Section 413 of the 1932 Code of that State, prescribing six years for the institution of suit for damages for wrongful acts causing death, such part of the right of action created by the Statute as will cause it to follow the action into a foreign State and control the time for instituting suit in

the foreign State, or is such Statute a time limitation affecting the remedy so that the limitation of the forum State will control?

3—Is respondent's suit instituted March 8th, 1940, two years, five months and four days after his cause of action arose now barred by the Statute of Limitations of twelve months as prescribed by the laws of the State of Tennessee, Tennessee Code Sections 8592, 8595, 8340 and 8246, Appendix 1.

REASONS RELIED ON FOR GRANTING WRIT

1—The judgment and opinion of the Circuit Court of Appeals for the Sixth Circuit in this case is in conflict with the decision of the Circuit Court of Appeals of the Eighth Circuit in the case of Eggen vs. Canadian Northern Railway Company, 255 Fed. 937, Certiorari denied 249, U.S. 594; the decision of the Circuit Court of Appeals of the Seventh Circuit in the case of Hutchings vs. Lamson, 96 Fed. 720; the decision of the Circuit Court of Appeals of the Second Circuit in the case of Platt vs. Wilmot, 118 Fed. 1019, affirmed 193 U.S. 602; the decision of the Circuit Court of Appeals of the First Circuit in the case of Ramsden vs. Knowles, 151 Fed. 721; and the same Circuit in the case of Dexter vs. Edmonds, 89 Fed. 467; and the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of Kansas City Southern Railway Co., vs. Maynor, 209 Fed. 611.

In the case of Eggen vs. Canadian Northern Railway Company, supra, action for personal injuries was instituted in the United States District Court for the District of Minnesota for a cause of action arising in Canada under its Railway Act, Chapter 37, Paragraph 306, which required

suit to be instituted within twelve months. While the Act itself is not copied in the opinion, the Court states that the Canadian Statute, which is invoked, "requires that suits such as this shall be brought within one year." It then holds that such requirement is not a part of the action itself and says, "such character of Statutes have no extraterritorial force. Therefore the Minnesota law, being that of the forum, governs."

It is to be observed, however, that the Minnesota Statute of Limitations was held unconstitutional as violative of Section 2, Article 4 of the National Constitution by reason of the fact that the Minnesota Statute limited its benefits **to citizens of that State alone.**

In the case of Hutchings vs. Lamson, supra, suit was instituted in the United States District Court for the Northern Division of the Northern District of Illionois, to enforce against defendants statutory liability as stockholders in a Kansas Corporation. Under the pleadings, issue was made as to whether the Statute of Limitations of the State of Kansas where the cause of action arose, or the Statute of Limitations of the forum State, Illinois, would control. The Court in holding that the limitation of the forum controlled, said:

> "The contention of the plaintiff in error that the Kansas statute of limitations alone can have any application to the case is manifestly not tenable. The general rule is that in respect to the limitation of actions the law of the forum governs, and while the courts will enforce a limitation established under the law of another state, when applicable, it does not do so to the exclusion of the law of the forum. It would involve serious and possibly absurd consequences, if it were established that a right of action created and governed

by the law of Kansas could be enforced in Illinois after the time when, by the law of the latter state, the action had been barred. The cases cited show that the law of Kansas, if applicable, will be enforced in Illinois, but they do not say nor imply that a like or different limitation by the statute of Illinois may not apply." Hutchings vs. Lamson, supra.

In the case of Kansas City Southern Railway Co., vs. Maynor, supra, suit was instituted in the District Court for the Eastern District of Texas for damages for personal injuries on a cause of action arising in the State of Louisiana. Issue was made as to whether the lex loci or the lex fori would apply. In holding that the limitation of the forum would apply, the Court said:

"The statute of Louisiana, providing that actions for offenses and quasi offenses shall be prescribed by one year (R.C.C. La., art. 3536), affects the remedy primarily; and while it may extinguish the right in Louisiana at the expiration of one year, it is not applicable in the courts of another state, to which the injured party has lawfully removed while the right of action in Louisiana subsisted." Kansas City Southern Ry. Co., vs. Maynor, supra.

2—The Circuit Court of Appeals in this case has decided an important and far reaching question of local law, probably in conflict with applicable local decisions of the Supreme Court of Tennessee. Such holding is in conflict with:

The case of Gassaway vs. Hopkins, et al, 38 Tenn., 583, where the Court held that each State had the right to control the time within which suits may be litigated in its Courts, saying:

"Each State has the right to settle the time within which suits must be brought or may be litigated in its own Courts. Hence, the law of the State where a suit is instituted without regard to where the cause of action originated, governs, as to the defences upon prescription, or limitation of actions."

The case of Barbour vs. Erwin, 82 Tenn., 721, adhering to the same principle, where the Court said:

"The same author says, limitation and prescription are applied only according to the law of the forum. And if a foreigner bring an action for a debt in a State which is barred by its law, although it would not be at home, he is bound by the law of the forum and cannot recover. The reason given is, all States make their laws of peace and have a right to determine for all who resort to their tribunals, how soon after the debt is due the creditor must claim or lose it. The law of the forum must govern on the ground that the whole question of limitation or prescription is one of process and remedy, and not of right or obligation."

The case of Fitzsimmons vs. Johnson, 90 Tenn., 443, where the Court again said:

"In determining the legal **right** of complainant, we apply the law of Ohio—the law of the domicile; and in matters of **remedy** to be enforced here we give force to the law of this State—the law of the forum." (Italics ours).

The case of Hartman vs. Duke, 160 Tenn., 137, where the Court said:

"The law of Tennessee, being the law of the forum, would control only the **practice and pro-**

> **cedure** through which our court enforced the **right given** by the Arkansas statute." (Italics ours.)

In denying to the Tennessee Courts and to Federal Courts sitting in Tennessee, the right to apply the Statute of Limitations of the State of Tennessee, the decision of the Circuit Court of Appeals is in conflict with the well established law of this State.

3—The Circuit Court, in this case, has rendered a decision apparently in conflict with applicable decisions of the United States Supreme Court, the Circuit Court holding that where a limitation is contained in the Statute creating a right that the lex loci will be applied rather than the lex fori. This is in conflict with this Court's holding in the case of Platt vs. Wilmot, 193 U.S. 602. In this case, suit had been instituted in the Northern District of New York to enforce statutory stockholders' liability in a Kansas Corporation. Upon apt pleading, the question arose as to what Statute of Limitation would control, the Court, after considering the situation, held that the law of the forum controlled, saying:

> "It is not the case of a state legislature assuming to regulate foreign corporations, and no such attempt has been made. The substance of the legislation is that when suits are brought in the state of New York to enforce therein the liabilities of directors or stockholders, the statute of limitations enacted by the legislature of that state in regard to directors or stockholders of domestic corporations shall also apply to directors or stockholders of foreign corporations. This is what the legislature has done and this is what it had the right to do.
>
> The Federal courts, sitting in the state, will, in cases brought therein, enforce the state statute

of limitations in actions of this nature." Platt vs. Wilmot, supra.

4—The questions presented are grave questions of public importance involving conflicting decisions between the highest Court of the State and the Federal Court sitting in the State, and is one that should be settled by this Court.

5—The Circuit Court of Appeals has, so far, departed from the accepted and usual course of judicial proceedings and application of Statutes as to call for an exercise of this Court's power of supervision.

Wherefore, it is respectfully submitted that this petition for writ of certiorari should be granted.

S. E. Massengill, doing business as
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